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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
Correspondence Address	ANGELA R GOTT JONES DAY 901 LAKESIDE AVENUE CLEVELAND, OH 44114-1190 UNITED STATES tfraelich@jonesday.com, agott@jonesday.com, pcyngier@jonesday.com
Submission	Response to Board Order/Inquiry
Filer's Name	Sabrina J. Hudson
Filer's e-mail	sabrina.hudson@us.hjheinz.com
Signature	/Sabrina J. Hudson/
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Attachments	Reply to Applicant's Petition to Director for Reconsideration.pdf(237900 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS INC. and	)	Opposition No. 91194974 (Parent)
H. J. HEINZ COMPANY,	)	and Opposition No. 91196358
	)	
Opposers,	)	U.S. Trademark Application 77/864,305
	)	For the Mark SMART BALANCE
vs.	)	
	)	
GFA BRANDS, INC.,	)	U.S. Trademark Application 77/864,268
	)	For the Mark SMART BALANCE
Applicant.	)	

**REPLY TO APPLICANT’S PETITION TO  
THE DIRECTOR FOR RECONSIDERATION**

On January 17, 2014, the Trademark Trial and Appeal Board (the “Board”) granted Opposers’ Motion to Strike Applicant’s Trial Brief on the basis it was not timely filed. Applicant has petitioned the Director for Reconsideration arguing the Board committed clear error of fact and law when it struck Applicant’s Trial Brief. Pursuant to 37 CFR § 2.146(a)(3), the Director will reverse the Board’s ruling only where there is a clear error or abuse of discretion. Contrary to Applicant’s argument, the Board did not commit clear error or abuse its discretion when it granted Opposers’ Motion to Strike Applicant’s Trial Brief. The Board evaluated each of the four *Pioneer* factors, determined the third *Pioneer* factor should be accorded more weight in this case, determined such factor weighed heavily against Applicant and as a result, correctly struck Applicant’s Trial Brief.

## **I. ARGUMENT**

### **A. The Board Correctly Applied the Four-Factor *Pioneer* Test and Therefore, Did Not Commit Clear Error or Abuse its Discretion.**

Applicant attempts to argue the Board committed clear error by collapsing the four-factor *Pioneer* test into a one-factor test. In reading the Board's decision, it is clear the Board did not collapse the four-factor *Pioneer* test. Instead, the Board analyzed each factor and determined whether the factor weighed in favor of Applicant or Opposers and to what degree. The Board correctly determined the third *Pioneer* factor, the reason for the delay, including whether it was in the reasonable control of Applicant, could be considered the most important factor in a particular case. *See Poly John Enterprises Corp. v. 1-800-Toilets Inc.*, 61 U.S.P.Q.2d 1860, 1861 (T.T.A.B. 2002). Recognizing that one factor may carry more weight than other factors in conducting the analysis does not in and of itself mean the Board disregarded the other factors. In fact, by analyzing each factor and determining which factor should be given more weight shows the Board conducted the proper analysis.

Applicant attempts to support its argument by citing to other cases in which the Board decided not to strike the late-filed trial brief. In all of the cases cited by Applicant, the length of the delay was less than the length of the delay in this case. In fact, in three of the four cases cited, the length of the delay was only one or two days, not six days as in the present case. In other cases, the Board has refused to consider a late-filed trial brief, including a brief that was filed only four days late. *See Information Builders, Inc. v. Bristol Techs., Inc.*, Opp. No. 91179897, TTABVue Doc. No. 46, at 5 (T.T.A.B. Jan. 10, 2011); *See also Green Bay Packers, Inc. v. Sebora*, Opp. No. 91120345, 2003 WL 1964050, at \*2 (T.T.A.B. Apr. 18, 2003) (refusing to consider applicant's brief and granting opposer's request to strike the brief because it was untimely filed). Moreover, as discussed in Opposers' Reply in Support of Opposers' Motion to

Strike Applicant's Trial Brief, Applicant's failure to timely file its Trial Brief is not an isolated incident of misconduct by Applicant's counsel in this case. As such, it was within the Board's discretion to hold that the facts of this case weighed in favor of granting Opposers' Motion to Strike.

### **B. The Board Will Still Be Able to Reach a Fair and Correct Decision**

Applicant attempts to argue the Board will be hampered in its decision-making process if the Applicant's Brief is not considered. In making this argument, Applicant argues the Trial Briefs are particularly important in this case. However, Applicant's own actions negate this argument. If its Trial Brief was so important, why was Applicant not more diligent in reviewing and following the rules for timely filing its Trial Brief? Moreover, if the Trial Briefs are more important in this case than in other opposition cases, reducing Opposers' time to reply to Applicant's Trial Brief by six days, does in fact prejudice Opposers, which means the Board should have determined *Pioneer* factor one in favor of Opposers. Finally, the Board will have an adequate opportunity to hear from both parties to help the Board reach a fair and correct decision at the hearing. In fact, the Board has previously stricken a party's trial brief even when a hearing was not held. See *Green Bay*, 2003 WL 1964050, at \*2.

## **II. CONCLUSION**

For the reasons set forth above and in Opposers' Motion to Strike Applicant's Trial Brief, and Opposers' Reply in Support of Opposers' Motion to Strike Applicant's Trial Brief, Opposers

respectfully request the Director uphold the Board's decision to strike Applicant's Trial Brief on the basis the Board did not commit clear error or abuse its discretion.

Respectfully submitted,

By: /Sabrina J. Hudson/

Sabrina J. Hudson

Deputy General Counsel

H.J. Heinz Company

One PPG Place, Suite 3100

Pittsburgh, PA 15222

(412) 456-6004

[Sabrina.hudson@us.hjheinz.com](mailto:Sabrina.hudson@us.hjheinz.com)

Attorney for Opposers

ProMark Brands Inc. and H. J. Heinz Company

## **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via email, on this 19<sup>th</sup> day of February 2014, to Counsel for Applicant:

David R. Cross  
Marta S. Levine  
Johanna M. Wilbert  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue, Suite 2040  
Milwaukee, Wisconsin 53202-4497

[David.cross@quarles.com](mailto:David.cross@quarles.com)  
[Marta.levine@quarles.com](mailto:Marta.levine@quarles.com)  
[Johanna.wilbert@quarles.com](mailto:Johanna.wilbert@quarles.com)

/Sabrina J. Hudson/  
Attorney for Opposers